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No. 71-559

IN THE SUPREME COURT
OF THE UNITED STATES
October Term 1971

UNITED STATES OF AMERICA, PETITIONER

-vs-

CHESTER FULLER AND MAXINE FULLER

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF FOR MONTANA PUBLIC LANDS COUNCIL IN SUPPORT OF THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Montana Public Lands Council hereby submits its brief in support of the decision of the United States Court of Appeals for the Ninth Circuit in this matter. Montana Public Lands Council is an unincorporated association of persons and corporations engaged or interested in the livestock industry. Montana Public Lands Council has a staff of officers and directors.

OPINION BELOW

The opinion of the court of appeals is reported at 442 F.2d 504.

JURISDICTION

The jurisdiction of this court rests on 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the owner of land taken by the United States is entitled to have included in the measure of his compensation the value of grazing permits on adjoining federal lands or, stated another way, is the owner of lands taken by the United States entitled to be compensated for said lands on the basis of their value as enhanced by the appurtenant grazing rights or permits?

STATUTE INVOLVED

The Taylor Grazing Act, 43 U.S.C. 315, and following, as amended.

STATEMENT

Statement of Petitioner, the United States, in its brief is sufficient for our purposes.

ARGUMENT

I.

THE TEST OF "MARKET VALUE" SHOULD BE APPLIED IN THIS CASE

We submit that the ultimate question here is whether or not "market value" is somehow determined differently in a condemnation action brought by the United States than it is in the ordinary dealings between private parties. Specifically, is the market value of the lands owned by Mr. and Mrs. Fuller one amount if sold to a private party or if condemned by, say, the State of Arizona, and some other amount if taken by the United States? The cases do not indicate this. In United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, the court said that private property shall not be taken for public use without just compensation, and that this is measured by "market value fairly determined." As the court knows, there are many condemnation cases making substantially the same holding. Petitioner is, in effect, asking the court to apply a different standard in the case at bar.

II.

THE UNITED STATES MAY BE CHARGED FOR VALUE ATTRIBUTABLE TO IT OR BROUGHT ABOUT BY GOVERNMENT POLICY

Petitioner asserts in its brief (page 12) that in determining the landowner's constitutionally guaranteed just compensation, the United States is not to be charged for values which it has created. Petitioners cite in support of this statement, *United States v. Cors*, 337 U.S. 325, *Shoemaker v. United States*, 147 U.S. 282, *United States v. Miller*, 317 U.S. 369, and *United States v. Reynolds*, 397 U.S. 14. These cases, we submit, are not in point because they deal with circumstances entirely different than those presented

to the court in the case at bar. The value created by the government in the cases cited by petitioner had to do with the value increase brought about by the government's action in taking the property and by the government's need for the property. That is not the situation here. If petitioner's argument were to be upheld in this case, then it could be said that the enhanced value of private property brought about by its proximity to some federal facility could not be considered in a condemnation action brought by the United States. For example, it is commonly thought that certain commercial locations close to a post office are desirable or that recreational facilities close to a national park are desirable. Would petitioner argue that somehow the increment in value to those properties by virtue of their locations would have to be determined and not considered in a condemnation action brought by the United States? We submit that petitioner's argument on this point is untenable.

Section 3 of the Taylor Grazing Act does, in fact, provide that a permit does not create any estate in or to the lands. However, we submit that this does not require a holding that the value of the private lands cannot be enhanced by the grazing rights on the public domain. We submit that the proposition spelled out in the case of *Iriarte v. United States*, 147 F.2d 105, 167 ALR 494 (C.A.1), is applicable here. That was a situation where the government condemned for military purposes 33 acres of land fronting on San Juan harbor. It was contended that there was a well known policy of the United States with reference to dredging in navigable waters if and when commercial needs

required additional facilities in any particular locality, and that the land should be valued accordingly. In the *Iriarte* case the court said:

> ". . . an increment added to the value of land by a governmental policy is not to be deducted from the fair market value of land condemned in order to arrive at the amount of the just compensation which must be paid therefor. And this indication is supported by practical considerations. For instance, it would obviously be impossible as a practical matter to deduct from the fair market value of agricultural land all elements of its value due to the Government's agricultural policy. Many other similar elements of value might be mentioned, even the element of value inhering in all property as a result of the Government's defense policy. However, we think enough has been said to warrant the conclusion that the criterion of fair market value is to be applied without subtraction from the result thereby obtained of any elements of value resulting from the general policies of the Government."

The court went on to say:

> "But before any governmental policy can be considered as affecting the market value of property, there must be evidence to indicate that the existence of that policy would be taken into consideration by the willing buyer and the willing seller whose bargain is the test of value."

So, in the *Iriarte* case, although the court determined that the general governmental policy in question was not applicable, the proposition mentioned was enunciated.

We submit that the use of the public domain for livestock grazing purposes is not only a government policy, but is a statutory enactment as embodied in the Taylor Grazing

Act. The fact that grazing permits may be revoked or withdrawn by the sovereign does not destroy the existence of the policy as enacted into law by Congress. The government policy of dredging harbors, as in the *Iriarte* case, could, no doubt, be terminated at any time also. Further, the case at bar presents an even stronger situation than the *Iriarte* case because here the use of the public domain for grazing was and is a fact in existence. The land was being used for that purpose, while in the *Iriarte* situation the land involved was not then a harbor site.

In another case, *United States v. Citrus Valley Farms, Inc.*, 350 F.2d 683 (C.A. 9), the court held that a trial court instruction was correct, a portion of such instruction being quoted below:

> "If the preponderance of the evidence shows that the governmental policy which I have described, that is, the right to a cotton allotment, enhanced the value of Citrus Valley Farm on July 1, 1959, the jury should give effect thereto in its determination of fair market value.
>
> "However, it must be borne in mind that defendant is entitled to be compensated only for that which was taken from him by the Government. It is a part of the governmental policy respecting cotton allotments, as expressed in Section 1378 of the Agricultural Adjustment Act, that, if a cotton farm is condemned, the owner has a personal right within three years to re-establish and use the cotton allotment on other farms to be acquired and owned by the displaced owner, subject to the county average allocations of the county

> or counties in which the new farm or farms are located. This has sometimes been referred to during the trial as the Section 1378 right.
>
> "If you find from a preponderance of the evidence that the cotton allotment rights retained by defendant and not taken by the Government, in accordance with Section 1378, had a pecuniary value to the defendant, it follows that insofar as the cotton allotment affected the market value of Citrus Valley Farm on July 1, 1959, the just compensation to which defendant is entitled is something less than defendant would have received if he had voluntarily sold the farm with the cotton allotment to a willing buyer."

The allotment was transferable to other lands, so the jury was instructed to determine the value of the cotton allotment separately. In the case at bar that element is not present. The *Citrus Valley* case is important because of the holding that the value of the land may be enhanced by a governmental policy, to-wit: the right to a cotton allotment and that a jury may consider that item in arriving at just compensation. In the *Citrus Valley* case, the government policy was embodied in the Agricultural Adjustment Act, 7 U.S.C., Section 1341, et seq.

III.

LOWER COURT SHOULD BE UPHELD IF GOVERNMENTAL POLICY IS TO BE CONSISTENT

Internal Revenue Service Regulation 20.2031-1(b) states in part:

> "The value of every item of property includible in a decedent's gross estate under sections

> 2031 through 2044 is its fair market value at the time of the decedent's death, except that if the executor elects the alternate valuation method under section 2032, it is the fair market value thereof at the date, and with the adjustments, prescribed in that section. The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts."

This definition is certainly consistent with the condemnation cases. As between buyers and sellers, the carrying capacity or number of livestock that a ranch will support is one of the principal items of concern in determining price. Although we are unable to locate any written regulations or policies wherein the Internal Revenue Service states specifically that grazing rights or permits on the public domain are to be considered in valuing a ranch for estate purposes, they are necessarily a factor because of the definition of "fair market value" contained in the regulations. It is common knowledge that as between buyers and sellers of livestock ranches, the grazing rights or permits are of major import.

We submit that it would be inconsistent for the government to tax grazing rights or permits on the one hand and, on the other, to say that they have no value. If the government's position in the case at bar were adopted by the court, a situation could very well develop where a ranch would be valued for estate tax purposes as enhanced by the existence of grazing privileges, and within a short time thereafter paid for by the United States, in a condemnation action, at a price which would be a fraction of the value

for estate tax purposes.

Another area where a government agency places value on grazing rights is found in the loan policy of the Farmers Home Administration. Here again, we have been unable to locate specific written regulations or policy stating that grazing rights are to be considered in valuing a ranch. It is common knowledge and it is obvious that the practice is followed, however. The Farmers Home Administration uses "fair market value" in their loan appraisals. The Farmers Home Administration has financed many grazing associations in the western part of the country in recent years. Most of those in the state of Montana are made up of private lands, state lease lands, and federal lands. One of the most recently formed grazing associations in northeastern Montana was the Wittmayer Grazing Association, to which the United States, through the Farmers Home Administration, loaned the sum of $900,000.00 for the purpose of purchasing a ranch. The ranch purchased was made up of lands, approximately ten percent of which were privately owned by the sellers, and the greater portion of the balance was federal lands administered by the Bureau of Land Management. The Farmers Home Administration loaned virtually the entire purchase price of the ranch. It was obvious that the Farmers Home Administration placed great emphasis on the value of the lands as enhanced by the grazing rights. Grazing associations of this kind are made up of individual members. It staggers the mind to contemplate the effect on the members of the grazing association should the United States, sometime in the future, condemn the lands and not

be required to pay for the value of the private lands as enhanced by the grazing rights. It would be inconsistent for the government to value a ranch for loan purposes under one standard and adopt an entirely different standard for valuation in condemnation proceedings.

IV.

PUBLIC POLICY AND ECONOMIC CONSIDERATIONS

Buyers and sellers of ranches, lendors of money, government and private, have come to rely upon the fact that livestock ranches are enhanced in value by virtue of the grazing rights appurtenant to them. The financial community and the livestock industry have developed a confidence in the stability of livestock operations which make use of grazing rights under the Taylor Grazing Act. To adopt the position advanced by the government in the case at bar would, it is submitted, seriously undermine this confidence, to the detriment of the livestock industry.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1972

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CHESTER FULLER AND MAXINE FULLER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In our opening brief we discussed two reasons why, when part of a cattle operator's fee land is taken for public use, the Fifth Amendment does not require that he be paid, above the value of the land itself, for the value formerly added to his land by the grazing of revocable grazing permits. First, the Fifth Amendment requires compensation for the taking of property, and revocable grazing privileges on the public domain are not property interests. Second, the value of permitted grazing on public land is a special value—in effect, a subsidy to the cattleman—created by the United States, for which

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it is not required to pay in the award of just compensation to the adjoining landowner.

Respondents, on the other hand, rely principally on the proposition that the existence of grazing permits on public lands has substantial value in the marketing of adjoining ranch lands. The Montana Public Lands Counsel, a livestock producers' association, has filed an *amicus curiae* brief in support of respondents that charges the government with inconsistency in adhering to the market value standard for tax and loan evaluation purposes, but deviating from that standard in condemnation.

1. We have no quarrel with the statement that in condemnation as in tax evaluations the general standard is fair market value. But there are important exceptions to this principle in the law of eminent domain, which reflect significant differences in purpose from tax or mortgage valuation. As *United States* v. *Miller*, 317 U.S. 369, 375, makes clear, not every factor weighed in market transactions is a Fifth Amendment ingredient for which the United States must pay when it condemns property. An example is value added by the government.

In eminent domain, in which money is taken from the public fisc to compensate a private person, it is just for the public to subtract from market value the value it has already directly added to the private property. Otherwise the public would pay twice for the same value—once when it conferred it and again when it compensated the owner for the increased value. In tax cases, to the contrary, if the government

has increased the value of the taxpayer's property that is all the more reason why the taxpayer, having received a benefit, should be taxed on the full value of his property. The situations are opposite rather than parallel, and it is proper that a different rule is applied to each.[1]

2. Similarly, elements of value considered in mortgage financing are not determinative of the United States' obligation to pay just compensation upon condemnation. Credit transactions are particularly unreliable as an indicator of just compensation because they depend upon many uncertain and non-transferable factors, such as commercial speculation, personal managerial ability, and the honesty and financial ability of the borrower.[2] See *Mandl* v. *City of Phoenix*, 41

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[1] If a comparison is made between valuation for property tax purposes and valuation for eminent domain, the fallacy of seeking a single rule for taxation and eminent domain valuation—or even for different kinds of tax valuation—is especially clear. Because of the different considerations involved in tax assessments, leading generally to undervaluation, the great weight of authority is that tax assessed valuation of land is not even admissible as evidence of market value in eminent domain cases. *Murdock* v. *United States*, 160 F.2d 358, 362 (C.A. 8); *Bowie Lumber Co.* v. *United States*, 155 F.2d 225, 228 (C.A. 5); *United States* v. *Certain Parcels of Land in the County of Arlington*, 261 F.2d 287, 289–291 (C.A. 4).

[2] The Federal Housing Administration prescribes consideration of three risk factors: (1) property; (2) location; and (3) borrower. See McMichael's *Appraisal Manual* (4th Ed. 1964) c. 11, "Appraising the Moral Risk—Rating the Borrower," p. 151. Five chapters (7–11) of this manual are devoted to risk factors.

Ariz. 351, 355–356; *McInnis, et al.* v. *Brown County Water Improvement Dist. No. 1,* 41 S.W.2d 741 (Tex. Civ. App.). Moreover, the availability of federal financing has properly been rejected as a measure of value in condemnation, because it involves valuation on a "business venture basis." *United States* v. *Certain Property, Borough of Manhattan,* 374 F.2d 138 (C.A. 2). The fact that the cattle and loan industries assign value to the availability of grazing permits is not at all inconsistent with our position, but to the contrary, makes clear the subsidy already provided cattle operators and the impropriety of increasing that subsidy by elevating it to the status of a compensable property right contrary to the express terms of the statute that creates it.[3]

3. The respondents contend (Br. 9) that a landowner is entitled to have his land valued with respect to its environment, including environmental values created by general governmental policy, such as the establishment of schools, roads, and other public amenities. We do not dispute this proposition with respect to benefits generally available to the public. Grazing permits, however, afford individual cattle operators a special privilege to use a portion of the public domain to the exclusion of everyone else. And Congress has specifically declared that this privilege

[3] 43 U.S.C. 315b. See *LaRue* v. *Udall,* 324 F. 2d 428 (C.A. D.C.), in which the court rejected an attempt by cattle operators, who had pledged preferential grazing rights as security for a loan, to convert their grazing privileges into property rights so as to block the Secretary's approval of an exchange of public grazing land.

"shall not create any right, title, interest, or estate in or to the lands." 43 U.S.C. 315b.

This case differs significantly from *United States* v. *Citrus Valley Farms, Inc.*, 350 F. 2d 683 (C.A. 9), cited by the *amicus* (Br. 6–7). There, no use of the public domain was involved and the cotton allotment, rather than being a direct subsidy, was an absence of restriction or a partial restriction. Under the applicable statute (7 U.S.C. 1378), the allotment was transferable to other land the appellant might own and the case turned on the valuation of this transferable right. In *Iriarte* v. *United States*, 157 F. 2d 105 (C.A. 1), also relied on by the *amicus* (Br. 4–6), the court stated that value added by the "general policies of the Government" (*id.* at 111) must be included in the value of the land taken, but rejected a claim for added value as a result of possible government dredging. To the extent that the case can be read to imply that special values adhering to property as a result of possible use of public land or waters must be included in the government's just compensation (and it is not clear to us that it goes that far), then it is inconsistent with this Court's decisions in *United States* v. *Twin City Power Co.*, 350 U.S. 222, and *United States* v. *Rands*, 389 U.S. 121.

In short, this case does not involve the question of the consideration to be given general environmental factors or general governmental policies which might enhance the value of land taken. The question here is whether the government must pay for a special, per-

mitted (but by statute revocable) use of public land adjacent to the land taken. There is, as explained in our principal brief, no difference in principle between this case and *United States* v. *Rands, supra.*

4. The *amicus* also states (Br. 10) that the financial community and the livestock industry have developed confidence in the stability of livestock operations which make use of grazing privileges under the Taylor Grazing Act. The decision we seek in this case will not destroy that confidence. As we state in our opening brief (pp. 18–20), rather than stabilizing the industry or achieving the purpose of the Taylor Grazing Act, attaching compensability to the value of grazing privileges would inhibit the government in the granting and maintenance of these revocable permits.

CONCLUSION

For the foregoing reasons, and for those set forth in our main brief, the judgment of the Court below should be reversed.

Respectfully submitted.

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